1941

File No. O Civ P.C./41

Legal DEPARTMENT
A BRANCH

Subject:—

Opinions under the Civil Procedure Code.

PUBF

File No. O C P.C. /41

42-A

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Office of the R.L.A.

If the summons is to be returned to the court on the ground that the document required to be produced has not been described with reasonable accuracy, there is no objection to informing Mr. Phadke as proposed at p.5 ante.

Sd/-

Remembrancer of Legal Affairs.

U.R.to F.D..No. 626.dated the 22nd January 1941.

PSM. 11/4

Submitted.

2. The Secy. F.D. has received a witness summons to produce in Court "तडजोडीच्या मूळ प्रती" Attention is invited to para.1 of F.D. office note atp. 7 ante. The point for consideration is that since the contents of the summons are not clear whether it should be sent back to the court to make the position clear.

meaning 'Original of Pension Commutation'

3. It is true that the Marathi words quoted above, Viz. (original of the pension commutation) do not specifically indicate the nature of the document required to be produced in court. However, from the application of Mr. G.K.Phadke (vide p.1 of linked case) and the concluding lines of the F.D. office note (vide portion marked A) read with the application (vide slip B.in F.D.file No. 812/33) made by Mr. Joshi it appears that the said application for commutation of pension is required to be produced in court. However, as the wording of the summons is not clear on this point, there does not appear to be any legal objection to return the summons to the Sub-Judge, Panvel, requesting him to make the position clear as desired by the F.D.

Sd/-
21/1/41

The particular document required to be produced has not been described in the summons with reasonable accuracy (see O. 16 rule 5 C.P.C) Consequently there is no objection to returning the summons to the court as proposed in para. 1 of F.D. office note at p.7ante.

Sd/-
21/1

PSM: 11/4 R.L.A.

Sd/-
21/1

Office of the R.L.A.

The particular document required to be produced has not been described in the summons with reasonable accuracy (see Order 16, rule5, Civil Procedure Code). Consequently there is no objection to returning the summons to the court as proposed in paragraph 1 of F.D. office note at p.7 ante.

Sd/-

Remembrancer of Legal Affairs.

U.R. to F.D. No. 627 dated the 22nd January 1941.

PSM. 11/4.

Religious and charitable endowments
Religious and charitable properties belonging to the Bene-Israel Prarthana Mandir at Pen, taluka Pen, district Kolaba.

Government of Bombay.
Revenue Department.
Resolution No. S.101/6018.
Bombay Castle, 8th March 1941.

Letter from the Collector of Kolaba, No. L.A.W. 313, dated the 17th February, 1941.

Memorandum from the Commissioner, Southern Division, No. L.A.W. 645, dated the 27th February 1941.

Resolution:- In exercise of the powers conferred by section 93 of the Code of Civil Procedure, 1908, the Government of Bombay is pleased to accord sanction to the exercise, by the Collector of Kolaba, of the powers conferred by section 92 of the said Code on the Advocate General in respect of institution of the suit by Messrs. Moses Rahamim Penkar and Obadia Samuel Kandalkar in connection with the religious and charitable properties belonging to the Bene-Israel Prarthana Mandir at Pen.

By order of the Governor of Bombay,

R.F.Keith.
Under Secretary to Government.

To

The Commissioner, Southern Division,
The Collector of Kolaba (with the case papers),
The District Judge, Thana,
The Remembrancer of Legal Affairs,
The Legal Department,
The Home Department.

PGM. 11/4 No. of 1941

Copy forwarded for information and guidance to

Lands: Dharwar.

Hunshikatti, taluka Hangal.
Petition in matter of restoration of Watan character of certain lands.

GOVERNMENT OF BOMBAY.
Revenue Department.
Resolution No. 6792/33.
Bombay Castle, 23rd January, 1941.

Petition dated the 15th August, 1940, from Mr. Krishnaji Shriniwas Nadgir of Dharwar --Applying for the restoration of the Watan character of certain lands and praying that the lands sh should be described in Government records as of Watan Character liable to pay judi only and not the assessment.

Government memorandum, No. O/27134-F, dated the 12th September 1940, to the Collector of Dharwar.

Letter from the Collector of Dharwar, No. R.E.V. 692, dated the 23rd September 1940.

Government memorandum, No. O/29678-F, dated the 27th September 1940, to the Commissioner, Southern Division.

Memorandum from the Commissioner, Southern Division, No. W.T.N. 1139, dated the 5th October 1940.

Reference to the Remembrancer of Legal Affairs, dated the 22nd October, 1940.

Memorandum from the remembrancer of Legal Affairs, No. 10824, dated the 10th December 1940:-

"By Government Resolution, Revenue Department, No. 6792/33, dated the 24th May 1937 the pargana watan land in dispute belonging to Gurunath Govind in the Dharwar district was resumed by Government by the levy of full assessment on the ground that the holder had mad default in payment of judi. By Government Resolution, Revenue Depart ment, No. 6792/33, dated the 14th April, 1938 Government informed the several watandars including Gurunath Govind, that ~~of the grant~~ restoration of the watan would be considered as an act of grace if all the arrears of judi in respect of the lands were paid by a certain date, Gurunath Govind did not pay the arrears and the lands comprised in the watan were ordered to be entered as watan in Government records by Government Resolution, Revenue Department, No. 6792/33, dated the 20th February 1940. In the meantime some of the lands belonging to Gurunath Govind were brought to sale

to sale in execution of a decree of a civil court which was transferred to the Collector for execution. In the sale proclamation the lands in dispute were described as pargana watan lands and the sale was held on 10th July 1939. The lands were purchased by the petitioner. The sale was confirmed on 18th June 1940 and the auction purchaser was put in possession of the lands on 2nd August 1940. The auction purchaser applies to Government for restoration of the watan character of the lands and prays that the lands should be described in Government records as of watan character liable to pay judi only and not the assessment.

"2, The question for consideration in this case is whether this request of the auction purchaser should be allowed, The Revenue Department, however, has raised the question whether a mistake in the proclamation of the sale would invalidate the sale itself. It has been held that misstatement of the value of the property or of the Government revenue in the proclamation of the sale held by a civil court would be material irregularity as being calculated to mislead the intended bidder and would be a ground for an setting aside the sale. (I.L.R. 20 All. page 412 and38 Mad. 387). But the petitioner inthis case does not want the sale to be set aside; his request is that the watan character of the lands should be restored and that the lands should be entered in the Government records as watan. The lands were resumed by Government Resolution, Revenue Department, No; 6792/33, dated the 24th May 1937 and merely as an act of grace Government informed Gurunath Govind that they would consider the restoration of the lands in case thearrears of judi were paid,. It is true that in the proclamation of sale the lands were described as pargana watan but that would not enable the auction purchaser tohave the lands restored to him on that tenure. Themistake of the Collector in describing the lands in the proclamation of sale as pargana watan would not stop Government contending that they were resumed. If the contention of the auction purchaser is that he was mislead in bidding at the sale on account of the misdescription of the lands , his remedy is to apply for the cancellation of the sale."

Resolution:- Government agrees with the view expressed by the Remembrancer of Legal Affairs. Copies of the Remembrancer of Legal Affairs' opinion should be forwarded to the officers concerned for information and guidance.

2. The petitioner should be informed that his request for restoration of the watan character of the lands in question cannot be granted.

PSM. 11/4

By order of the Governor of Bombay,

R.F.KEITH,

Under Secretary to Government.

G.R.No., 6793/33, R.D., dated the 3rd January 1941.

To

The Commissioner, Southern Division,
The Collector of Dharwar,
The Remembrancer of Legal Affairs,
The petitioner (by letter).

No. of 1941.

PSM. 11/4,. Copy forwarded for information and guidance to

No. P/D.R. 27/34
Office of the Collector of Kolaba,
Alibag, 21st October 1940.

From
Rao Bahadur K.B.Bhadrapur, M.A.,
Collector of Kolaba,.

To
The Remembrancer of Legal Affairs,
Bombay.

Subject:- Lands.
Sale of - in execution of a Civil Court Decree.

Sir

I have the honour to forward herewith the papers in Darkhast No. 100/1934 of the Sub-Judge, Court Pen, for favour of opinion on a legal point.

2. The facts of the case are briefly as under:-

One Mr. Meru Harashet Kalan, Plaintiff, obtained a decree for Rs. 2335/- and interest on 21-12-31 against one Shankar Ganpat Kalan, Defendant, (page 14 of the file). The court transferred the Darkhast to the Collector for execution on 26-11-1934. Independently of the Darkhast proceedings, proceedings for the recovery of Abkari arrears due from Mr. S.G. Kalan, the Defendant, were in progress. The papers of the latter proceedings have unfortunately been lost, but it is apparent that before the sale of the defendant's attached lands in 3lots could be held, two of the lots were sold away in September 1935 for the realization of the Abkari dues and were purchased by Government for nominal @ bid of rupee one only. It is true that these lands were attached by the court prior to 21-12-1931, but this fact, it seems, was not known to the Revenue Authorities. A note as to there being a charge of the Abkari arrears on the lands was, however, made in the Record of Rights in 1932. But it is not understood under what authority such a note could be made. The Sub-Judge pointed

pointed out that the lands were attached by the court prior to their attachment for the excise-dues and objected to the sale for realizing the Abkari arrears, (page 163 ofthe file) He further said that Government should have claimed precedence over the plaintiff's claim in a court of law,(page 150 of the file). It was in reply brought to the notice of the Sub-Judge that the claim of Government had precedence over private claims under section 137 L.R.Code. The Sub-Judge, however, asserted that section 137 would have to be read with section 151 L.R.Code and, therefore, the current dues alone would have priority,(page 163 of the file). Further, he opined that it would be sufficient to state in the proclamation of sale of all the three lots, for the information of intending purchasers, the fact of the purchase of the two lots by Government and the circumstances under which the purchase had been made.(page 165 of the file). The Government Pleader also agreed to this course and so sale-proclamations were issued accordingly, (page167 of the file). But the lands have not still been sold.

3. Mr. M.H.Kalan, the Plaintiff, being aggrieved by the purchase of the two lots by Government. contends that the Abkari dues of Government cannot take precedence over his prior decretal claim and requests that all the lands should be put to sale for realising his dues, setting at naught the purchase of the two lots made by Government,(page 187 of the file). I am inclined to agree with his contention.

4. In the circumstances explained above, I would request you to be good enough to enlighten me as to what course I should adopt.

5. The case papers enclosed may please be returned.

I have the honour to be,
Sir,
Your most obedient servant,
Sd/-
Collector of Kolaba.

PSM. 11/4

Submitted.

2. One Mr. Moru H. Kalan had obtained a decree in C.S.No.325 of 1930, for Rs. 2335/-, on 21st December 1931, against Shankar Ganpat Kalan, who had also made a default in respect of certain Abkari dues. The Court transferred the darkhast to the Collector for execution on 26th November 1934. It appears that Shankar's lands were attached in lots but before they could be sold two of the lots were sold by Government in September 1935 for the realization of the Abkari dues and were purchased by Government for a nominal bid of rupee one only. The Sub-Judge objected to the sale of lands in two lots for realization of Abkari dues as they were attached by Moru, the judgement-creditor prior to their attachment and sale by Government, and Government could claim precedence over private claims in respect of the current dues only under section 137 read with section 157 of the Land Revenue Code (p. 163 of the file). Further he stated that it would be sufficient to state in the proclamation of sale the fact of the purchase by Government of lands in two lots for the information of the intending purchaser(p.165). Accordingly the sale proclamations were issued but the lands could not be sold as yet. Moru, the judgement-creditor, being aggrieved by the purchase of the two lots by Government, contends that the proceedings terminating in the sale of two lots of lands for recovery of Abkari dues by Government were invalid by reason of the fact that the lands had been attached by the Civil Court at his instance before these proceedings started and that therefore the sale already held should be

should be set aside and that all the lands should be sold again for realizing his decretal claim. The Collector considers that there is a strong case in favour of the judgement-creditor and he requests R.L.A.'s advice as to what course he should adopt in the circumstances.

3. It appears that Shankar, the Judgment-debtor in C.S. No. 325 of 1930 had committed default in payment of certain Abkari dues. Under sec. 34 of the Abkari Act the amount could be recovered from him as if the amount was an arrear of land revenue, namely, by the processes named in Chapter XI of the Bombay Land Revenue Code, 1879. His lands in two lots were accordingly brought to sale, and the sale was duly proclaimed and held and the lands purchased by Government. The sale was thus lawful and proper and vests in Government, the right, title and interest that the judgment-debtor had in the lands. It is now contended by Meru, the judgment-creditor, that the ~~Marux the judg~~ proceedings terminating in the sale of lands for recovery of Abkari dues by Government were invalid by the reason of the fact that the lands had been attached by the Civil Court at his instance before the proceedings started, and that Government's claim cannot take precedence over his prior decretal.

No. 123

Office of the
Remembrancer of Legal Affairs,
Bombay Castle, 7th January 1941.

From

J.R.Dhurandhar, Esquire, O.B.E.,
Remembrancer of Legal Affairs.

To

The Collector of Kolaba.

Subject:- Lands.
Sale of-in execution of a
Civil Court Decree.

Sir,

With reference to your letter No.P/D.R.27/34, dated the 21st October 1940, on the above subject, I have the honour to state as follows:-

It appears that Shankar, the judgment debtor in C.S.No. 325 of 1930 had committed default in payment of certain Abkari dues. Under section 34 of the Abkari Act the amount could be recovered from him as if the amount was an arrear of land revenue, namely, by the processes named in ChapterXI of the Bombay Land Revenue Code, 1879. His lands in two lots were accordingly brought to sale, and the sale was duly proclaimed and held and the lands purchased by Government. The sale was thus lawful and proper and vests in Government, the right, title andinterest that the judgment-debtor had in the lands. It is now contended by Moru, the judgment-creditor, that the proceedings terminating in the sale of lands for recovery of Abkari dues by Government were invalid by the reason of the fact that the lands had been attached by the Civil Court at his instance before the proceedings started, and that Government's claim cannot take precedence over his. It is true that the lands were attached prior to the revenue sale, but that

but that does not affect the validity of the revenue sale. For an attachment of property has the effect merely of preventing and avoiding a private alienation thereof, and does not prevent involuntary alienation (see section64 of the Civil Procedure Code, Qurban Ali vs. Ashraf Ali I.L.R.4 All.219F.B.; Lalu Mulji Vs. Kashibai, I.L.R.10 Bom. 400 at p.407). It does not ipse facto create a charge or lien on the property in favour of the attaching creditor and confers no title on him; and it cannot invalidate an alienation by operation law (see Seobul Chunder Vs. Russik Lall, I.L.R.15 Cal. 202; Motilal vs. Karrabuldin I.L.R. 25 Cal.179, P.C. at p.185; Frederick vs. Madan Gopal I.L.R.29 Cal. 428; I.L.R.32Mad.429;I.L.R.3 Lah.414). Consequently the attachment made as abovesaid cannot affect the validity of the involuntary alienation effected by the revenue sale. The question of priority under section 137 of the Bombay Land Revenue Code is irrelevant; it would have arisen only if Government had laid claim to the proceeds of a sale held in execution of Meru's decree. In this case Government had, in law, the right to enforce its claim by sale of the defaulter's land, and it has done so. The sale is valid and vests in Government the defaulter's interest in lots Nos. 1 and 2 (2 All.182) The defaulter therefore has no longer any subsisting interest in the said property which can now be sold in execution of Meru's decree.

2. The papers received with your letter under reference are returned herewith.

I have the honour to be,
Sir,
Your most obedient servant,

Sd/-
for Remembrancer of Legal Affairs.

INDIAN POSTS AND TELEGRAPHS DEPARTMENT.

EXPRESS LETTER.

BY HAND No. LY-212. Dated Bombay the, 25th April, 1941.

To

The Remembrancer of Legal Affairs,

Bombay Castle, B O M B A Y.

Reference:- Savings Bank frauds committed at the Shivajinagar P.O. under Poona Head Office.

Sir,

I have the honour to say that Mr. P.D.Purandare, a clerk of the Shivajinagar P.O. under the Poona H.O. has committed a series o of savings bank frauds from the savings bank accounts standing at that Post Office. The frauds were discovered on the 15th April 1941 and Mr. Purandare was arrested on that day. The amounts misappropriated that have so far come to light aggregate Rs.45000/-. The savings bank work at the Shivajinagar post office was being done by the Sub-Postmaster, Mr. R.G.Bhagwat but this duty was delegated to Mr. Purandare during the absence of the former between 1to 3 P.M. It has also come to light that even when the Sub-Postmaster was present, he occasionally allowed the clerk to transact savings bank business independently. The Sub-Postmaster has, it is reported, failed to carry out certain departmental checks and as he has shown criminal negligence in the matter it is very likely that some portion of the loss sustained by Government will eventually have to be recovered from him by means of a Civil Suit. I understand that the Sub-Postmaster owns a house and has also some money in local banks. It is essential, therefore, that he should be prevente from disposing of his property or money in advance to forestall such a recovery. I shall be very much obliged if you will kindly advise me at a very early date as to what steps should be taken in that direction and if considered advisable, to issue necessary,

necessary instructions to the Government Pleader, Poona in the matter.

I have the honour to be,

Sir,

Your most obedient servant,

Sd/-

for Postmaster-General.

PSM. 12/4.

L. D.
3823/26.4.41.

Submitted.

The Postmaster-General, Bombay, in his letter, at p.1 ante, states that it was discovered on 15-4-41, that Mr. P.D. Purandare, a clerk of the Shivajinagar Post Office had misappropriated an amount aggregating Rs.45,000/- from the Postal Savings Bank. It is stated that some portion of the loss sustained by the Postal Department was due to the negligence of the Sub-Postmaster, Mr. R.G.Bhagawat, who allowed the clerk to transact the Savings Bank business independently. The Postal Deptt. now intends to file a civil suit against Mr. Bhagwat for recovery of the loss sustained by that Deptt. due to his negligence. But before the suit is actually instituted they desire that action should be taken preventing him from disposing of his property and also some money lying in a local bank.

2. It does not appear that any action can be taken to prevent the Sub-Postmaster from disposing of his property before any suit is instituted against him for the recoupment of the loss suffered by Govt. But after a suit is instituted it may be possible to get his property attached under Order 38, Rule5 of Schedule I to the Civil Procedure Code, 1908, if he is about to dispose of the same. The Postmaster-General may be informed accordingly.

P.S.Nadkarni.
5/5.

P.A.

Sd/-
6/5.

R.L.A.

Sd/-
6/5.

P.S.M. 12/4

No. 4137.

Office of the
Remembrancer of Legal Affairs.
Bombay Castle, 7th May 1941.

From

P.N.Moos, Esquire, I.C.S.

Remembrancer of Legal Affairs.

To

The Postmaster General,

Bombay,.

Subject:- Savings Bank frauds committed at the Shivajinagar P.O. under Poona Head Office.

Sir,

With reference to your letter No.LY-212, dated the 25th April 1941, on the above subject, I have the honour to state that it does not appear that any action can be taken to prevent the Sub-Postmaster Mr. R.G.Bhagwat from disposing of his property before any suit is instituted against him for the recoupment of the loss suffered by Government. But after a suit is instituted it may be possible to get his property attached under Order 38, Rule 5 of Schedule I to the Civil Procedure Code, 1908, if he is about to dispose of the same.

I have the honour to be,

Sir,

Your most obedient servant,

Sd/-

For Remembrancer of Legal Affairs.

PSM. 12/4

Submitted.

In R.L.A.'s opinion No.4730, dated 17-5-40, the G.D. was advised to the ask the Cantonment Magistrate to make an application to the District Courts, Poona, under section 88 of the Indian Lunacy Act, 1912, for recovery of arrears of maintenance charges from the Cantonment Board, Poona. An Application (Misc. Application No.222 of 1940) was accordingly made by the Sub-Divisional Magistrate, Poona Cantonment, which for the reasons unreceived his order, dated 18-2-41, was discussed by the D.I., Poona. In para. 2 of his letter No.G-117, dated 3-3-41, the D.G.P., Poona, states that as his order is not applicable, an application for decision may be made to the High Court under section 115 of the Code of Civil, Pro. 1908. The R.L.A. is requested to advise whether it is desirable to make an application for decision to the High Court under section 115 of the Code of Civil Pro. 1908, as recommended by the D.G.P., Poona.

2. Section 115 of the Code of Civil Procedure, 1908, provides for the exercise of revisional powers of the High Court. But it is necessary that the following conditions sho should be satisfied before such powers can be exercised:-

1. There must have been a case decided by a Subordinate Court and the court deciding the case must be one sub-ordinate to the High Court.

(2) The decision must be one in which no appeal lies.

(3) The Sub-ordinate Court must have in the decision of the case,

(a) exercised a jurisdiction not vested in it, or

(b) failed to exercise a jurisdiction vested in it, or

(c) acted in the exercise of its jurisdiction illegally

illegally or with material irregularity.

In the presents case. the District Court, Poona, is a Court Subordinate to the High Court and no appeal lies against the order passed under section 88 of the Indian Lunacy Act (see section 104 and O.43, r.i. Civil Procedure Code). As the District Court exercised jurisdiction vested in it by section 88 ~~fx~~ of the Indian Lunacy Act, 1912, the case will not be governed by cl.(a) of section 115 of the Code of Civil Prodedure, 1908. The D.G.P. holds the view that the court failed to exercise a jurisdiction vested in it by law(vide Clause(b)) of section 115) and the question is whether the D.G.P.'s view is correct. The Court observed thus:-

"I think the only remedy is for the Provincial Government to move the Central Government to issue a direction to the Cantonment Board to pay the expenses of the maintenance of Bagamma under Cl.(d) of the second proviso to section 109 of the Cantonments Act, 1924. Until such a direction is issued by the Central Government the Cantonment Board is under no liability to pay the expenses of the lunatic and no order can be passed against it under section 88 of Indian Lunacy Act, 1912".

From this it is clear that the court has decided the matter and reached the conclusion that order applied for cannot be made until the.

P.S.M.
12/4

R.L.A.'s Office

The view taken by the District Judge, Poona, is correct, and an application under section 115 of the Code of Civil Procedure, 1908, will not succeed.

Sd/-

For Remembrancer of Legal Affairs.

U.R. to G.D. No. 5053, dated 8/6/1941.

PSM.12/4

Ex. No. 11.

In the Court of the District Judge,
at Poona.

Mis-Application No.222 of 1940.

Pleaders. Under section 88 of Act IV of 1912 (Indian Lunacy Act).

Govt.Pleader. The Sub Divisional Magistrate, Poona Cantonment.----------Petitioner.

Vs.

The Cantonment Board, Poona.

Mr. Chaubal. (Notice to be served on its Executive Officer). ----------Defendant.

This is an application under section 88 of the Indian Lunacy Act 1912, made by the Sub-Divisional Magistrate, Poona Cantonment, for the recovery of the arrears of maintenance of a lunatic named Begamma Kom Chinappa from the 18th of October 1930. Begamma, a lunatic residing within the limits of the Poona Cantonment was detained in the ~~Yeravada~~ Central Mental Hospital of Yeravada from the 17th of November 1929 under a reception order passed by the Sub-Divisional Magistrate, Poona Cantonment under section 14 of the Indian Lunacy Act, 1912. On the 30th of November 1929 the Cantonment Magistrate passed an order that the maintenance charges of Begamma should be recovered from the Cantonment Board, Poona, at the rate of six annas per day from the 5th of November 1929. The Cantonment Board informed the Magistrate that they had no objection to pay the maintenance charges as ordered. But at that time no order under section 88 of the Act was obtained from the District Court. The Cantonment Board went onpaying the maintenance charges at the rate directed until the 17th of October 1930 when the Board was informed that the lunatic had been discharged from the hospital on the 18th of October 1930. It was subsequently discovered in April 1939 that Begamma had not been really discharged from the Mental Hospital and it was through a mistake that the Board had been informed of her discharge. Hence on the 18th of April 1939 the

the Superintendent, of the Central Mental Hospital wrote to the Cantonment Board that Begamma was still an inmate of the Mental Hospital and asked for the payment of the arrears from the 18th of October 1930 to the 31st of March 1939, amounting to Rs. 1157-10-0. After some correspondence, the Cantonment Board informed the Superintendent of the Central Mental Hospital on the 28th of August 1940 that the Board was prepared to pay the current maintenance charges with effect from the 18th of April 1939 when the mistake was communicated to it, but would not pay any arrears prior to that date. Accordingly the maintenance charges are being paid since the 18th of April 1939 and in this application an order for the payment of the arrears from the 18th October 1930 is prayed for under section 88 of the Indian Lunacy Act, 1912.

2. Before its amendment by Bombay Act XV of 1936, section 88 of the Indian Lunacy Act, 1912, empowered the authority which made the reception order or any local authority liable for the cost of maintenance of such lunatic detained in an asylum, to apply to the District Court for an order for the payment of the cost of maintenance of the lunatic. By section 2 Sub-section (1) of Bombay Act XV of 1936 the authority which made the the reception order was empowered to apply to the District Court for an order for the payment of the cost of maintenance of the lunatic against "any local authority liable for the cost of maintenance of such lunatic under any law for the time being in force". By sections 3 and 4 of that Act suitable amendments were made also in the Bombay District Municipal Act, 1901, and Bombay Municipal Boroughs Act, 1925, respectively. The question therefore, is whether the Cantonment Board is a local authority liable for the cost of maintenance of the lunatic, Begamma. It is not disputed that Begamma was resident of the Poona Cantonment. It is no also seriously disputed that the Cantonment Board is a "Local Authority"

Authority" as defined in section 3(28) of the General Clauses Act 1897, . But there is no provision in the Cantonment's Act,1924, corresponding to section 70 of the Bombay Municipal Boroughs Act, 1925, and section 55 of the Bombay district Municipal Act. 1901, which requires that every municipality shall, out of the Municipal property and fund, make payments at prescribed rates for the maintenance and treatment of lunatics at any suitable asylum. Section 116, which prescribes the duties of the Cantonment Board, does not include the maintenance of pauper lunatics residing within its jurisdiction. Section117 clauses(K) and(I) confer a discretion upon the Board to make provisions for adopting any measure, other than those specified in section 116, likely to promote the safety, health or convenience of the inhabitants of the Cantonment and also for th doing of anything on which expenditure is declared by Central overnment, to be an appropriate charge on the Cantonment Fund. But such a liability may be undertaken by the Board at its discretion. So far as the maintenance of lunatics is concerned, the only provision made in the Cantonments Act,1924, is in Clause(d) of the second proviso to section 109. Section 109 provides that:-

> "The Cantonment Fund and all property vested in Board shall be applied for the purpose, whether express or implied, for which by or under this Act or any other law for the time being in force, powers are conferred or duties or obligations are imposed upon the Board"

3. The second proviso to that section lays down the priority to be given for meeting the liabilities and obligations of the Board, and clause (a) says:-

> "to the payment of such expenses on account of pauper lunatics sent from the Cantonment ~~Board~~ to public lunatic asylums and mental hospitals as the Central Government directs the Board to pay"

4. This shows that the compulsory liability for the payment of the expenses on account pauper lunatics arises only if the Central Government directs the Board to pay them. If the Central Govt. issues such a direction, then the payment of the

the expenses gets a priority in the order set out in the second proviso to section109. But if no such direction is iss by the Central Government, there is no absolute liability on Cantonment Board to pay the expenses on account of pauper lunatics sent from the Cantonment to Mental Hospital. In the absence of such a direction the Cantonmat Board may in exercise of the discretionary powers vested in it by Section 117 pay the maintenance charges of any lunatic resident of the Cantonment sent to the Mental Hospital. Section 88 of Indian Lunacy Act, 1912, as amended by the Act XV of 1936 enables the District Court to order a local authority to pay the cost of maintenance of such a lunatic, only if the local authority be liable to pay it under any law for the time being inforce. The learned Government Pleader is not able to cite any provision under which the Cantonment Board is liable to pay the cost of maintaining Begamma in the Mental Hospital. He merely says that the Board was paying the cost since she was detained in the Hospital under a reception order. It appears that the Cantonment Board consented to make the payment as it could do under section 117 of the Cantonment Act, 1924. But even then, it could not have been compelled to pay. the cost of maintenance if it had refused tha pay. I think that the only remedy is for the Provincial Government to move the Central Government to issue a direction to the Cantonment Board to pay the expenses of the maintenance of Begamma in the Central Mental Hospital under Clause(d)of the second proviso to section 109 of the Cantonment Act, 1924. Until such a direction is issued by the Central Government the Cantonment Board is under no liability to pay the expenses of the lunatic and no order can be passed against it under section88 of the Indian Lunacy Act, 1912.

PSM. 12/4

5. For these reasons I dismiss the application, but under the circumstances I pass no order regarding the cost, of the application.

Sd/- N.S.Lokar.

18th February 1941. District Judge Poona.

R.I.No. 4410
13/5/41.

Submitted.

Section 54 of the Civil Procedure Code provides that in the case of a decree for the partition of an undivided estate assessed to the payment of revenue to the Crown, or for the separate possession of a share of such an estate, the partition of the estate, or the separation of the share shall be made by the Collector or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with the law (if any) for the time being in force relating to the partition, or the separate possession of shares, of such estates. The Settlement Commissioner and Director of Land Records, Poona, in his letter at page 1 ante has raised the question whether after the partition or separation by the Collector or his Deputy, it is necessary that the possession of the shares should be handed over by the Collector or a gazetted subordinate of the Collector. The Settlement Commissioner states that throughout the Province such possession is being handed over by the Circle Inspectors. The Settlement Commissioner is of the opinion that the partitioning or separation is a judicial act while the handing over of possesion of the shares is a merely formal act and therefore the latter can be legally done by a Circle Inspector as an agent of the Collector or his Deputy. He refers moreover to section 181 of the Bombay Land Revenue Code, 1879, and states that under that section possession is never handed over by the Collector but by a Circle Inspector or a Village Officer. Both the Collector of Belgaum and the District Government Pleader, Belgaum, are of the opinion that the practice of handing over possession of shares under section 54 through a Circle Inspector is not in

not in conformity with the requirements of the law. In these circumstances the Remembrancer of Legal Affairs is requested to advise on the question whether under section 54 of the Civil Procedure Code it is necessary that possession of the shares in a partition should be handed over by the Collector or a gazetted subordinate of the Collector.

2. Section 54 of the Civil Procedure Code requires, in the case of a decree for partition of an undivided estate assessed to the payment of revenue to the Crown, or for the separate possession of a share of such an estate, that the partition of the estate or the separation of the shares shall be made by the Collector or any gazetted subordinate of the Collector deputed by him in this behalf. The Settlement Commissioner says that under section 181 of the Bombay Land Revenue Code, 1879, which similarly provides that after a sale of any occupancy or alienated holding has been confirmed, the Collector shall put the person declared to be the purchaser into possession of the land, it is not usual for the Collectors to hand over possession themselves, but that the Circle Inspectors or the Village Officer hand over possession. This statement appears to be true so far as section 181 of the Bombay Land Revenue Code is concerned but it does not appear that it will be correct to rely.

Office of the R.L.A.

Order 20, Rule 18(1) of Schedule I to the Code of Civil Procedure, 1908, provides that where the Court passes a decree for partition of property or for separate possession of a share therein, then, if and in so far as the decree relates to an estate assessed to the payment of revenue to the Crown, the decree shall declare the r rights of the several parties interested in the property, but shall direct such partition or separation to be made by the Collector or any gazetted subordinate of the Collector deputed by him in this behalf, in accordance with such declaration and with the provisions of section 54,. Section 54 provides that where the decree is for the partition of an undivided estate assessed to the payment of revenue to the Crown, or for the separate possession of a share of such an estate, the partition of the estate or the separation of the share shall be made by the Collector or any gazetted officer deputed by him in this behalf. in accordance with the law (if any) for the time being in force relating to the partition, or the separate possession of such estates. The partition of an estate, or the separation of a share thereof, contemplated by section 54 includes the delivery of possession of the shares of the estate to the persons entitled thereto under the decree (see Parbhudas vs. Shankarbhat, I.L.R.11 Bom.662). This view is reinforced by the circumstance that the Code does not make provision for any report by the Collector on partition being made, and for further proceedings to be taken for putting the parties in possession. Consequently the delivery of possession is to be done, under section 54, by the Collector or by any gazetted subordinate officer deputed by him in that behalf. The view taken by the Collector and the District Government Pleader, Belgaum, is correct.

PSM.13/4

Sd/-
17/6
Remembrancer of Legal Affairs.

U.R. to R.D.,No. 5442, dated the 18th June 1941

U.R.

Religious and Charitable Endowments.
Religious and charitable properties belonging to temple of God Vishweshwar at Ratnagiri, district Ratnagiri.

Government of Bombay.
Revenue Department.
Resolution No.S.101/14956.
Bombay Castle, 21st June 1941.

Letter from the Collector of Ratnagiri, No.L.A.W.99 dated the 21st April, 1941.

Memorandum from the Commissioner, Southern Division, No. L.A.W. 647, dated the 4th May 1941, to the Collector of Ratnagiri.

Letter from the Collector of Ratnagiri, No. L.A.W. 99, dated the 5th June 1941, to the Commissioner, Southern Division.

Memorandum from the Commissioner, Southern Division, No. L.A.W. 647, dated the 10th June 1941.

Resolution:- In exercise of the powers conferred by section 93 of the Code of Civil Procedure, 1908, the Government of Bombay is pleased to accord sanction to the exercise, by the Collector of Ratnagiri, of the powers conferred by section 92 of the said Code on the Advocate General in respect of the institution of the suit by Mr. Dattatraya Govindshet Lubri and certain other citizens of Ratnagiri in connection with the religious and charitable properties belonging to the temple of God Vishweshwar at Ratnagiri.

By order of the Governor of Bombay,

R.F.Keith,

Under Secretary to Government.

To

The Commissioner, Southern Division,
The Collector of Ratnagiri,
The District Judge, Ratnagiri,
The Remembrancer of Legal Affairs,
The Legal Department,
The Home Department.

No. of 1941.

PSM. 13/4

Copy forwarded for information and guidance to

Submitted.

2. One Mr. Radhu Shiva, a Printer in the Govt. Photozincc Press, Poona, whose pay is Rs.25/- p.m. is heavily involved in debt and his salary is being constantly attached under orders of the Court of Small Causes, Poona. The P. & S.D.'s view is that all Govt. servants ~~xxx~~ including low paid Govt. servants fall within the definition of "public Officer" under sec. 2(17)(h) of the Civil Procedure Code, 1908, and that it is not possible to state why the salary of Mr. Shiva is being constantly attached despite the provisions of sec. 60(1)(i) of the Code. The S.D. requests R.L.A. to advise on the point.

3. It is true that under sec. 60(1)(i) of the Code of Civil Procedure, 1908, the salary of any public officer or of any servant of a railway company or local authority to the extent of the first hundred rupees and one-half the remainder of such salary shall not be liable to attachment or sale in execution of a decree of a Court. But it appears from p.3 ante, that Radhu Shiva has by compromise expressly waived the protection given to him by this section, and his salary was therefore constantly being attached under a decree of the Court. But it has since b been held by the High Court in Civil Revision Applications Nos. 99 and 100 of 1940 arising out of the judgment of the Small Causes Court, Poona, that a postal peon is a public officer and that the attachment of his salary as well as the transfer thereof are illegal and opposed to public policy.

Sd/- P.S.Nadkarni.
18/6.

A.S.

Under sec. 60(1)(i) read with sec.2(17) of the Civil Procedure Code Mr. Radhu Shiva is a public officer and his salary being less than Rs. 100 per month is exempt from attachment but his salary seems to have often been attached due to his waiver of the statutory protection under sec.60(1)(i), C.P.C. It has , however, been recently held by the Bombay High Court in Civil Revision applications Nos. 99 and 100 of 1940 with civil application No.x 172 of 1940 , that a waiver of protection under sec . 60(1)(i) by a public officer being opposed to public policy is illegal and such public officer's salary is not liable to attachment under sec 60(1)(i). Consequently themsalary of Radhu Shiva is not liable to attachment.

Sd/-
20/6.

A.L.R.

I agree.

Sd/-
20/6

R.L.A.

Sd/-

22/6.

PSM. 13/4.

Office of the R.L.A.

Under section 60(1)(i) read with section 2(17) of the Civil Procedure Code Mr. Radhu Shiva is a public officer and his salary being less than Rs. 100/- per month is exempt from attachment; but his salary seems to have often been attached due to his waiver of the statutory protection under section 60(1)(i), Civil Procedure Code. It has however been recently held by the Bombay High Court in Civil Revision applications Nos. 99 and 100 of 1940 with civil application No. 172 of 1940 that a waiver of protection under section 60(1)(i) by a public officer's salary is not applicable being opposed to public policy is illegal and such public Officer's salary is not liable to attachment under section 60(1)(i). Consequently the salary of Radhu Shiva is not liable to attachment.

Sd/-

26/6

Remembrancer of Legal Affairs.

Sd/-

24/6/41.

U.R.to G.D., No. 5736, dated the 30th June 19

PSM. 13/4.

R.I.No. 5824, dated 4/7/41.

Submitted.

2. Civil Suit No.333 of 1927 in the Court of the First Class Sub-Judge, Broach, filed by the plaintiff Sardar Maharsingji Ishwarsingji against Government was decided in favour of Government. Thereupon the plaintiff filed an appeal in the High Court against the decision of the First Class Sub-Judge. The High Court set aside the decree of the lower court and substituted another decree in its place. The decree of the High Court directed inter alia that defendant should pay the plaintiff's costs of the appeal and the trial court including the costs from the date of the filing of the suit to the 29th September 1933. The pleader of the plaintiff has now called upon Government to pay certain sums including a sum of Rs. 915-11-6, which was recovered from the plaintiff as Government's costs in the suit but which is now repayable to the Plaintiff by way of restitution and also interest thereon at 6p.c. per annum. The Government Pleader, Broach and Panch Mahals is of the opinion that the claim for the sum of Rs. 915-11-6 is correct but there is no apparent justification for the claim for interest on that sum as Government could not be said to have made any profit out of the sum of costs recovered from the plaintiff. He further says that there is no such rule or precedent. The R.L.A. has therefore been requested to advise in the matter.

3. It has been held that under sec. 144(1) of the Civil Procedure Code, where a sum of money is recovered in execution of a decree which is subsequently reversed, the judgment debtor is entitled to get not only the sum recovered but also interest for the period that the amount has been withheld

withheld from him (vide 20 All. 430). In the present case costs were recovered by Government from the plaintiff in pursuance of the judgment of the lower court. As that judgment has been reversed by the High Court the plaintiff is entitled to get back not only the amount of costs recovered from him but also the interest thereon for the period during which the amount was with Government. The Plaintiff claims interest at 6% p.a., which is reasonable and the claim may be allowed. The fact that the Government did not make any profit on the amounts of costs recovered from the plaintiff is immaterial, for in granting restitution it is the injury which has been caused to the party who is ultimately successful, that the Court seeks to remedy. The Court is not concerned with the actual benefit which may or may not have been gained by the other party (vide Chitale and Rao's Civil Procedure Code, Vol.1, p. 1145-6, Note 23). The Government Pleader Broach and Panch Mahals should therefore be informed that the claim for interest in question is valid.

Sd/-
9/7/41.

R.D. may be informed; as at A.A.

P.A.

Sd/-
10/7

R.L.A. I agree.

Sd/-
12/7.

Secy. R.D.

Sd/-
14/7/41

PSM. 13/4

R.L.A.'s Office.

Where a sum of money is recovered in execution of a decree which is subsequently reversed, the judgment debtor is entitled to get not only the sum recovered but withheld from him (vide 20 All. 430). In the present case also interest for the period that the amount has been ~~costs~~ were recovered by Government from the plaintiff in pursuance of the judgment of the lower court. As that judgment has been reversed by the High Court the plaintiff is entitled to get back not only the amount of costs recovered from him but also the interest thereon for the period during which the amount was with Government. The plaintiff claims interest at 6% per annum. which is reasonable and the claim may be allowed.

Sd/-

For Remembrancer of Legal Affairs.

Sd/-
16/7
P.A.

PSM. 13/4. U.R. K to R.D. No., 6230, dated the 17th July 1941.

R.I.No.8594
9/9/41.

Submitted.

In case No.309(B/267) the Bombay Revenue Tribunal has held that in cases in which decrees have been transferred to the Collr. for execution under section 68 of the Civil Procedure Code, the Collr's order passed in execution is final as the rules framed by the Provl. Govt. under section 70 do not provide for an appeal or a revision application against the ~~Sanad~~ Collr's order. In his opinion No. 8792 dated 4/9/1939 the R.L.A. has held that not only an appeal under section 203 but a revision application to Govt. can lie under section 211 of the Bombay Land Revenue Code, 1879, in respect of such orders of the Collr. in execution. As the Commr. S.D. has raised the point again the R.L.A. is requested to advise whether the Collr's orders in execution of decrees transferred to him under section 68 of the Civil Procedure Code are final (vide para.3 of the R.D. office note dated 3-9-41 at pp. 3-4 ante).

2. In para. 3 of his opinion No. 345 dated 10-1-1939, the R.L.A. had advised, in a case where the Collr. in execution of a decree had confirmed the auction sale of certain lands forming part of a talukdari estate, that it was open to Govt. to set the sale aside under section 211 of the B.L.R. Code, 1879. In his opinion No. 8792 dated 4-9-1939 the same view was reiterated, reliance being placed on the Bombay High Court decisions in Mancherji vs. Thakurdas,7 Bom. L.R.682 and Balkrishna vs. Malkajappa, 35 Bom.L.R.761

at p.762. It has been held in the former that the Revenue Commissioners of Govt. are vested with appellate powers under section 203 of the Code in respect or Collr's orders in execution. The R.L.A. therefore held that if an appeal could lie under section 203, the revisional powers under section 211 would also follow. The opinion dated 4-9-1939 has also been followed by the R.L.A. in his subsequent opinion No.5010 dated 27-5-1940. It will thus be seen that the view that the Collr's orders in execution can be revised by Govt. in exercise of the powers conferred upon it by section 211 of the B.L.R.Code has been consistently taken by the R.L.A. in a series of opinions and is well fortified by two decisions of the Bombay High Court. The R.D. may therefore be informed that the R.L.A. does not see any reason to modify the view taken by the previous R.L.A.

Sd/-
22/9/41.

A.S.

It is true as observed by the Revenue Tribunal in case No.309(O/267) that the rules framed by Government under sec. 70, C.P.C. do not provide for an appeal or a revision application against the Collector's orders passed in the course of execution of decrees transferred to him under sec.68 C.P.C. but the conclusion of the Rev. Tribunal that the Collector's order is final does not appear to be correct. In his opinions No.8792, dated 4-9-1939 and No.5010, dated 27/5/1940, the R.L.A., relying on the decisions of ___ ___bay High Court in Mancherji vs. Thakurdas (7B.L.R.682) and.

PSM 13/4.

Office of the R.L.A.

It is true as observed by the Revenue Tribunal in Case No. 309 (O/267) that the rules framed by Government under section 70, Civil Procedure Code, do not provide for an appeal or a revision application against the Collector's orders passed in the course or execution of decrees transferred to him under section 68, Civil Procedure Code; but the conclusion of the Revenue Tribunal that the Collector's order is therefore final does not appear to be correct. In his opinions No. 8792, dated 4th September 1939 and No.5010, dated 27th May 1940, the R.L.A., relying on the decisions of the Bombay High Court in Mancherji v. Thakurdas (7B.L.R. 682) and Balkrishna v. Malkanjappa (35 B&L.R. 761 at p. 762), has held that an appeal or a revision application can lie against such order of the Collector under sections 203 and 211 of the Bombay Land Revenue Code. The rulings cited above have not been overruled and the R.L.A. can see no reason to modify the view expressed in his previous opinions

Sd/-

7/10

Remembrancer of Legal Affairs.

Sd/-
7/10/41.

U.R. to R.D., No. 8818, dated the 9th October 1941.

PSM. 13/4.

R.I.No. 10232.
5/11/41.

Submitted.

Attention is invited to R.L.A.'s opinion No.8818 dated 9/10/1941 in which the R.L.A. had held relying upon the previous opinions Nos. 8798 dated 4/9/1939 and 5010 dated 27/5/1940 and the decisions of the Bombay High Court in 7Bom. L.R.682 and 25 Bom.L.R. 761 that an appeal or revision application could lie under sections 203 and 211 of the Bombay Land Revenue Code, 1879, against the Collector's orders passed in the course of execution of decrees transferred to him under section 68 of the Civil Procedure Code. The H.D. has now raised the question whether in view of that opinion it is necessary to modify rule 17 of the rules framed by Govt. under sub-section (1) of section 70 of the Code for regulating the execution of decrees transferred to the Collector for execution. Rule 17 provides inter alia that no appeal shall lie against any order passed under the provisions of these rules. It appears that actually such decrees are executed by Mamlatdars or other Revenue Officers sub-ordinate to the Collector and an appeal lies to the Collector against their orders. It is not however considered necessary to allow a second appeal in such cases. The R.L.A. is therefore requested to advise how it would be possible to make the Collector's order final (Please see Secy. H.D.'s note dated 3/11/1941 at p.10 ante).

2. Rule 17 of the rules framed by the Provl. Govt. under sub-section (1) of section 70 of the Civil Procedure Code provides that an appeal shall lie to the Collector against any order passed under paragraphs 7,8and10(a) and (e)of the III Schedule to the Code and rules 11,13 and 15 of these rules by an officer

sub-ordinate to the Collector; subject to this provision, no appeal shall lie against any order passed under the provisions of the III Schedule to the Code or of these rules. This rule relates to clause (c) of the preamble under which rules have been framed in regard to appeals against certain orders passed by officers subordinate to the Collector. Rule 17 does not therefore provide for appeals against orders passed by the Collector. As stated by the R.L.A. the orders passed by the Collectors are subject to/appeal to or revision by the Provl. Govt. Consequently if it is intended that the Collector's orders in execution should be final, a suitable rule will have to be framed under section 70(1) of the C.P.Code

Sd/-
20/11/41.

A.S.

In exercise of powers conferred by sub-section (1) of section 70 of the Civil Procedure Code, 1908 the Governor in council prescribed certain rules regulating the execution of decrees transferred to the Collector for execution under the provisions of section 68 of the said Code in regard to three matters specified in clauses (a)(b) and (c) the last of which related to appeals against certain orders passed by officers subordinate to the.

Office of the R.L.A.

To achieve the object inview an express provision will have to be made in the rules making the relevant orders of the Collector final. The object can also be achieved by a suitable amendment of section 203, Bombay Land Revenue Code, 1879, but it would be simpler to amend the rules.

Sd/-
4/12

Remembrancer of Legal Affairs.

U.R. to H.D., No. 10462, dated the 5th December 1941.

PSM. 13/4.